87-1512

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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Case Number———

IN THE SUPREME COURT
OF THE UNITED STATES
October, 1987 Term

ARTHUR DANIEL DORITY, Jr.,)
Petitioner,)
v.)
The STATE OF OREGON,)
Respondent.)

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Oregon

Jesse R. Himmelsbach, Jr., Attorney for Petitioner,
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Baker, Oregon 97814
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QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner deprived of life, liberty or property, without due process of law, when the State of Oregon restricted his right to dispose of his fuel in a safe manner, fuel being plentiful?

2. Was Petitioner deprived of equal protection of the laws when being a member of a class, those who operate vehicles upon highways of the State of Oregon, he was required to conserve fuel when all persons outside of such class were unrestricted in its use and fuel was plentiful?

3. Was Petitioner's right to be secure in his person violated when he was stopped by the officer because petitioner was consuming fuel in safely driving his vehicle on a public highway at a speed greater than 55 miles per hour, fuel being plentiful?

4. Was Petitioner deprived of due process of law when the district court in which he was tried declined to take judicial notice of the fact that there was neither a current nor imminent fuel shortage in the State of Oregon at the time of his alleged violation, and neither of Oregon's appellate courts would consider the question?

5. Was Petitioner deprived of due process of law when Oregon's Legislative Assembly empowered the Oregon Transportation Commission to impose a 55 mile per hour speed limit because of "current" or "imminent" fuel shortages, and to keep such speed limit in force when fuel again became plentiful?

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Constitutional Provisions

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Regulation

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Text

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The only opinion written by any of the lower courts is the letter opinion of the trial court set forth in the Appendix at Page 19. The Order of the Court of Appeals of the State of Oregon affirming the judgment of the trial court without opinion is reported at 86 Or App 540 (1987).

JURISDICTION

On October 27th, 1987, the Supreme Court of the State of Oregon denied Petitioner's Petiton to Review the order of the Court of Appeals of the State of Oregon, which affirmed without opinion, the judgement of the District Court of the State of Oregon for Polk County finding Petitioner guilty of violating the Fuel Conservation Maximum Speed Limit, fining him $35, and levying costs of $6 against him, which money was withheld when Petitioner's bail was refunded.

This is a civil, not a criminal matter, and jurisdiction is in this Court pursuant to 28 U. S. C. § 2101 (e).

CONSTITUTIONAL PROVISIONS, STATUTES, etc.

Constitution of the United States, 4th Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, 5th Amendment, provides as here material:

> "No person shall. . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, 14th Amendment, Section 1 provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ORS 40.070 provides:

> "(1) A court may take judicial notice, whether requested or not.

"(2) A court shall take judicial notice if requested by a party and supplied with the necessary information."

ORS 40.065 provides:

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

"(1) Generally known within the territorial jurisdiction of the trial court; or

"(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

ORS 810.180 (formerly ORS 487.475 (1)) provides:

"* * * Speed limits established under this section are subject to the conditions described in the subsection granting authority to establish the speed limit as follows:

"(1) The Department of Transportation may establish a maximum speed limit that is applicable to the operation of all vehicles upon all highways in this state. A speed limit established under this subsection is subject to all of the following:

"(a) The department may only establish a speed limit under this subsection when the commission determines that there is a need to conserve fuel because of current or imminent fuel shortages and that limiting the maximum speeds of vehicles will conserve motor fuel.

"(b) The department may not establish a maximum speed of more than 55 miles per hour under this subsection.

"* * *

"(d) A maximum speed established under this subsection is not subject to change by any authority granted under any other subsection in this section.

"* * *

ORS 811.110 provides:

"(1) A person commits the offense of violation of the fuel conservation maximum speed limit if:

"(a) A fuel conservation maximum speed limit is established under ORS 810.180; and

"(b) The person operates a vehicle at a speed in excess of the fuel conservation maximum speed limit.

"* * *

OAR 734-20-010 [Oregon Administrative Rule] was promulgated by the Oregon Transportation Commission, and on June 25, 1974 was filed, and was still in effect on the day in question. It provides:

"Pursuant to the authority granted to the Oregon State Transportation Commission under Section 2, Chapter 6 Oregon Laws 1974 (enrolled House Bill 3306) the Oregon Transportation Commission hereby determines that there is a need to conserve fuel because of current fuel shortages and further determines that lowering the maximum speed of vehicles will conserve motor fuel. It is hereby ordered that a maximum speed limit of 55 miles per hour is hereby established for all highways within the state. Any prior rule or regulation adopted by the State Highway Commission or Oregon Transportation Commission in conflict with this order is hereby rescinded."

STATEMENT OF THE CASE

After motor fuel shortages inconvenienced Oregon's public, at a special session in 1974, Oregon's Legislative Assembly enacted what is now ORS 810.180. Pursuant thereto, on June 25th, 1974 the Oregon Transportation Commission promulgated what is now OAR 734-020-010, purporting to establish a 55 mile per hour fuel conservation maximum speed limit. This regulation has remained the same. ORS 811.110 made violation of the regulation a civil offense.

By March 27th, 1986, motor fuel shortages had long since been alleviated, and a world-wide oil glut prevailed. Motor fuel was plentiful in Oregon, but the regulation was not lifted.

On said date, Petitioner was operating his vehicle eastbound on a state highway with his son as a passenger. Officer Richard Easterday was operating his patrol vehicle westbound. It was equipped with a radar device, with which the officer tried to measure the speed of Petitioner's vehicle, which was greater that 55 miles per hour. The officer stopped Petitioner and cited him to the trial court. The only charge before the trial court was violation of the fuel conservation maximum speed limit; there was no contention by the state that the petitioner was proceeding in an unsafe manner in any way.

In the trial court Petitioner contended that the 55 mile per hour speed limit was unconstitutional because lawmaking power had been unlawfully delegated, that Equal Protection had been violated, that it was unreasonable and not competent for the State to make it unlawful for Petitioner to safely use a commodity which was in abundance, and that the officer had no right to stop him. Petitioner raised these questions orally and in a brief entitled, "Defendant's Brief Concerning the Unconstitutionality of the Maximum Speed Law (ORS 811.110 (1) and 810.100) and Related Procedures", from which excerpts are set forth in the Appendix.

Petitioner asked the trial court to take judicial notice of the fact that there was neither a current nor an imminent fuel shortage, and the trial court asked that authority for such be submitted. It was. **Cameron v. Gorce,** 182 Or. 581, 198 P.2d 596 (1948). However, judicial notice was not taken. It had been so taken in another Oregon trial court, and the state had acquiesced, which disparity was pointed out in Petitioner's Petition for Review (p.4), excerpt set out in the Appendix.

Some of the federal questions Petitioner raised in the trial court were passed on in a letter opinion which is set forth in the Appendix. Neither Oregon's Court of Appeals nor its Supreme Court issued an opinion.

While the principle was urged in the trial court, the first specific claim that the petitioner's rights under the Due Process Clause of the Fourteenth Amendment were violated occurred in his brief before the Court of Appeals (p.11). An excerpt appears in the Appendix.

ARGUMENT

The heart of this case is the fact that fluctuations occur in the world's fuel supply, and that while it may be competent for a state to impose restrictions on the use of fuel when there is a within-the-state shortage, when fuel again becomes plentiful such restrictions must be lifted. The competency of the Congress to address international policy or to influence the balance of trade is not before the Court.

The facts almost argue themselves. It was common knowledge that there was a fuel shortage in 1974 when what is now ORS 510.180 was enacted, and OAR 734-210-010 promulgated, and it was common knowledge on the day Petitioner was cited that not only was the fuel shortage over, there was a world-wide oil glut. Because of reasons which are only guessed at in the record, neither Oregon's administrative agency nor its legislature lifted the restriction imposed during the shortage.

As a result, what may have once been constitutional, became unconstitutional.

The police power is founded in reasonableness, and unnecessary restrictions are held to be unreasonable.

Simply put, the State of Oregon unreasonably restricted Petitioner's right to dispose of his property, and in the course of attempting to enforce the restriction, interferred with his life, liberty, tried to take a property right without just compensation, and then fined him without due process of law.

Oregon's appellate courts—at both levels—declined to give Petitioner relief. The court of first instance, in declining to take the requested judicial notice of the oil glut, did not reach the fundamental issue Petitioner presented—that changing circumstances can also change constitutionality. Petitioner furnished the trial court excerpts from publications with widespread circulations and national recognition, some 10 accounts, set out in the mentioned brief—excerpts from Barron's, Business Week, Forbes, Time, The Wall Street Journal, and the Oklahoman—all reporting aspects of the oil glut which the court disregarded, contrary to the provisions of ORS 40.070(2). Petitioner was thus deprived of due process of the law concerning the presentation of his defense.

Buchanan v. Warley, 245 U.S. 60, 62 L.Ed. 149, 38 S.Ct. 16 (1917) held that a white person could sell his property to a black person. In its reasoning this court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property [citation] Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land. [citation]"

In restricting Petitioner in the safe disposition of his lawfully acquired and held property, his gasoline, the State of Oregon unreasonably controlled and diminished his constitutionally protected rights.

With the passage of the fuel shortage, any justification for the restriction was also extinguished.

Petitioner was also put at a theoretical disadvantage by the legislation. Persons in other states quite possibly could have bought gasoline and used it in traveling safely at speeds greater than 55 miles per hour, provided that their state had not imposed such a speed limit on safety grounds. Such persons would have been entitled to the benefit of interstate commerce. Practically all of the petroleum products consumed in Oregon come into the state in interstate commerce. The challenged legislation impinges on an area of lawmaking reserved to the Congress. Thus Petitioner did not get equal protection, in that he was precluded from buying and using gasoline right along with others all over the world, as long as he doesn't hurt anyone. He wasn't hurting anyone.

CLOSING

This Court may be inclined to think, at first glance, that this is an insignificant case. Petitioner doesn't think so. He would not question the power of Oregon's Legislative Assembly, should it have so done, to put in place a 55 mile per hour maximum speed limit **as a safety measure.** This it did not do. Safety was not an issue in the lower courts, and it is not an issue before this Court. That Petitioner was traveling safely while he was expending his gasoline is a "given" fact. But Petitioner most seriously questions the power of the State of Oregon through an administrative agency furnished with incomplete guidelines, to take away his property, as the same time interfere with his liberty, and then through its courts fine him without consideration of a salient fact. Petitioner seeks relief here, in the Court charged with the ultimate responsibility to protect his liberty.

Respectfully submitted,

Jesse R. Himmelsbach, Jr.
Attorney for Petitioner.
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APPENDIX

The following excerpts are from "Defendant's Brief concerning the Unconstitutionality of the Maximum Speed Law (ORS 811.110 (1) and 810.100) and Related Procedures", which Petitioner filed in the court of first instance:

Analysis of the Law

This Court has before it what is essentially a police power case. Mingled with such questions are those concerning delegation of the legislative power and equal protection. * * *

* * *

Next considering the police power, it extends only to such measures as are reasonable. Measures so-based must be reasonable under all of the circumstances. The boundaries are those of reason.

Plaintiff has purported to have established under this power, a law which it has accused defendant of violating. Defendant questions the constitutionality of the law, on several grounds.

The law is in two parts. First there is the legislative enactment, and second there is the administrative order of the Oregon Transportation Commission, 1 OTC 28. The statute, ORS 810.180 [page 4, supra], purported to empower the Department of Transportation to establish a maximum speed limit. The administrative order set it at 55 miles per hour.

As we have seen, the fundamental principle is that legislative power cannot be delegated. Certainly the general lawmaking power cannot be delegated. **State v. Davis,** 207 Or. 525, 296 P2d 240 (1956). But that statement over-simplifies the law. It is clear that the legislature can provide for contingencies and that it can leave the "triggering" of such

enactments to the executive branch—to an administrative agency. But when the legislature does such, it must do so only within perimeters set by the constitutions. [Emphasis supplied] For instance, "* * * rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." **Pierce v. Society of Sisters, etc.**, 268 US 510, 535, 69 L Ed 1070, 45 SCt 571 (1925).

The concept of reasonableness permeates the police power. See **Marr v. Fisher**, 182, Or. 383, 187 P2d 966 (1947) wherein it is said the purpose of Art. I, Sec. 21 of the Constitution of Oregon is to prevent unlawful delegation of legislative authority.

Not only must enactments be reasonable, if fact-finding is delegated, such a law must be complete when it leaves the legislative halls.

"The police power is a law of necessity, and its extent must from time to time conform to the growth of our social, industrial and commercial life. You cannot put a straight-jacket on justice any more than you can put a straight-jacket on business.' 2 Cooley's constitutional Limitations (8th Ed.) 1227." **Daniels v. City of Portland**, 124 Or. 667, 265 P. 790, 59 ALR 512 (1928).

It has been said that "[t]he right to acquire and own property and to deal with it and use it as the owner chooses so long as the use harms nobody is a natural right to which the police power of the state is subordinate. [sic] 16A AmJur 2d Sec. 397, p. 106. In the instant case, Mr. Dority had a perfect right to own the gasoline he was using. He was using a small, economical car, and the Court judicially knows he was using less gasoline per mile than others who drive large Cadillacs and Lincolns. Compare **Fleming v. Gerlinger Motorcar Co.**, 86 Or. 195, 168 P. 289 (1922), where the Court took judicial notice of factors which affect economy in gasoline consumption. Mr. Dority had a passenger with him—his son. His son had a right to be driving a vehicle—let us say, following his father—also consuming gasoline. They were saving gasoline by traveling together. Consuming much less per person than the owner of the Cadillac or Lincoln, hypothetically driving along at 55 miles per hour, alone. It is patent that Mr. Dority was using his property—gasoline—without harming anyone. No motor fuel shortage existed, and it was unreasonable for the state to try to keep him out there on the highway traveling in his automobile for a longer period of time than was necessary. The state thus has taken his time—part of his life—for no good reason whatsoever.

The state had a converse duty. "'Governmental authorities have the duty and responsibility to keep their streets open and available for movement.' [quoting Cox v. Louisiana, 379 US 536, 555, 13 L Ed 2d 471, 484, 85 SCt 453]." **Shuttlesworth v. Birmingham,** 394 US 147, 27 L Ed 2d 162, 89 SCt 935 (1969). It follows under police power restrictions that [sic] the government cannot unreasonably limit speed.

The defendant emphasizes that there is no issue of public safety whatsoever in this case, and that in fact plaintiff's sole witness so testified. The right of the legislature to impose a 55 mile per hour maximum speed limit for reasons of safety, should it choose is not before the Court.

This Court also knows of the federal "arm-twisting" (by not only the Congress but also by the Department of Transportation) in threatening to withdraw federal funds from states which do not enforce a 55 mile per hour maximum speed limit. Secretary of Transportation Elizabeth Dole recently stated the need for a fuel conservation law no longer existed, but she did not urge the Congress to repeal the restrictive legislation. Whether or not the Oregon legislature foisted the onus of imposing an unpopular law on the Transportation Commission to escape the responsibility and at the same time have the state remain eligible for receiving federal fund [sic] is a question. A positive answer might explain why the irrational legislation was allowed to remain. Repeal might invoke the wrath of the federal government, as was recently demonstrated in the State of Nevada. In any event, whatever valid reason might have been in existence when the initial legislation was passed no longer exists. The reason for the rule having disapperared, [sic] the rule too, should disappear.

There is, of course, a strong presumption of the constitutionality of legislation. If the statute in question is to be upheld, it must be construed so as to impose the duty on the Transportation Commission to rescind its administrative order establishing the 55 mile per hour maximum speed limit when a motor fuel shortage no longer is "current" or "imminent." But it is not the function of the courts to add to legislation that which is left out. ORS 174.010. The statute is therefore incomplete. It therefore fails.

In **Foeller v. Housing Authority of Portland**, 198 Or. 205, 256 P.2d 752 (1953) we find:

> "* * * [I]t is clear that when an act leaves the legislative halls it must be complete and not contemplate that some other department of our government or an agency will complete it. In other words, the legislature cannot delegate the power to determine what the law shall be."
>
> "* * *
>
> When an agency is authorized to determine the existence of facts upon which a statute is to become effective, the latter must lay down the governing policy and standard. * * *" [sic]

Not only did the statute fail to tell the Transportation Commission to lift the restriction when the need for it no longer existed, it laid down neither governing policy nor standard for the magnitude of the maximum speed to be imposed. It merely put an upper limit of 55 miles per hour on what it allowed the Transportation Commission to do. On the authority previously cited, this Court also judicially knows that a maximum speed limit of 35 miles per hour would conserve more motor fuel than one of 55 miles per hour. The legislature did not tell the commission how much fuel to conserve. During World War II, a 35 mile per hour speed limit was the law of the land. Urgent need to conserve fuel, tires, parts etc. existed. But the restrictions were lifted when supplies were no longer needed for the war effort.

Here the Transportation Commission was given unconstitutional power. It was not told when to lift the restrictions. In the words of then Chief Justice Latourette our Supreme Court said in **Demers v. Patterson**, 197 Or. 466, 254 P.2d 213 (1953):

> "It is well established that the legislature cannot grant an administrative agency the power to regulate unless some standard or yardstick is provide in the act as a guide to the administrative agency; in other words, the authority to regulate may not be left wholly to the whim and caprice of such agency. [citing three Oregon cases].
>
> "* * *

"* * * Beyond this, the sky is the limit. There is no suggestion in the title of the act or in the act itself of the nature, extent or character of the regulations. It would appear that the department has carte blanche authority, beyond the limitation above mentioned, to formulate any regulations which it sees fit. * * *

"* * *

"We have repeatedly held that in determining the validity of a statute the decision of the court must be predicated on what it authorizes to be done and not by what has been done. [citing four Oregon cases]."

Here too, the statute must be tested on what it authorizes to be done, and not by what has been done. It authorizes the imposition of **any** speed limit—10 miles per hour—five miles per hour—the sky is the limit. No standard is fixed. The legislature did not set the 55 miles per hour limit itself, and then delegate the fact-finding which would "trigger" the law into existence. It allowed the Transportation Commission to set the limit or anything less. It gives the carte blanche authority that is forbidden. It is incomplete and it must fail.

Not only is the statute incomplete, it is overly broad. It relates to "all vehicles upon all highways in this state." It thus theoretically includes vehicles which are driven by electricity, steam, compressed air, sunshine, and for that matter, rubber bands. The word "vehicle" is all-inclusive. ORS 801.590. As far as the writer can discern, the vehicle code does not contain a definition of the words, "fuel", or "motor fuel." Fuel, or motor fuel can be diesel oil, heating oil, gasoline, kerosene, methanol, ethanol, propane, methane, liquified petroleum gas, liquid hydrogen, coal, charcoal, sawdust, sunshine, etc. The legislature has not told the Transportation Commission what sort of shortage to determine the existence of. The statute thus also is void for vagueness under **State v. Hodges**, 254 Or. 21, 457 P.2d 491 (1969) in that it thus delegates that power to the commission.

Another portion of the statute also raises questions of void-for-vagueness. ORS 810.180(1)(d) might be construed to mean that once the Transportation Commission has determined that a fuel shortage is current or imminent and established a maximum speed limit, its authority is then exhausted. If, however, ORS 810.180 (1)(d) is construed to mean only that the fuel conservation maximum speed limit established by the Transportation Commission takes precedence over and pre-empts any limit any county or municipal governing body, or the State Speed Control Board might establish, then either the basic statute must be held to contain an unwritten instruction to the Transportation Commission to lift the restriction when the shortage is over, or the statute must be held to contain a "hidden" (unwritten) unconstitutional conclusive presumption—the presumption that once a fuel shortage becomes either current or imminent, such condition will continue throughout eternity. Such a presumption runs counter to the entire experience of mankind. It clearly renders the statute unconstitutional.

In a basic case, **Tot v. United States**, 319 US 463, 87 L Ed 1519, 63 SCt 1241 (1943) the Supreme Court of the United States announced the principle:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than a might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to creat [sic] it as a rule governing the courts."

As stated, the statute contains no instruction or guideline to the Transportation Commission for the lifting of the speed restriction when the shortage is over.

If, however, the statute is construed to delegate power with implicit instruction and authority to revoke, rescind or modify the imposed limit, then the failure of the Transportation Commission to end the limit within a reasonable time after the shortage ended amounts to unconstitutional governmental inaction.

Violation of the Equal Protection Requirement

The writer believes that it doesn't take much citation of authority for this statement: If there is a fuel shortage, and it is necessary to the welfare of the people of the state that fuel be conserved, one class of citizens cannot be singled out, and required to conserve fuel under penalty, while all other citizens may expend it without limit, even waste it if they choose, with impunity. A reasonable basis for classification is required. **Savage v. Martin,** 161 Or. 660, 91 P.2d 273 (1939).

The legislature has singled-out a class: the operators of all vehicles upon all highways of the state. These citizens, whether they are using any motor fuel at the time or not, must not travel faster than the Transportation Commission says they can. All other travelers using motor fuel are exempt. The person with the gas-guzzling motorboat can travel as fast as he wishes, using much more gasoline than the average highway user. The owner of a private airplane the same.

All other users of fuel are exempt. The householder who heats his quarters with heating oil is not required to conserve. Nor is the farmer who tills with a diesel tractor. And on and on.

The law takes no regard of automobile size, weight, number of occupants per vehicle, necessity of the trip, whether the highway is uphill or downhill, the direction of travel upwind or downwind, other vehicles the operator may have at his disposal, and on balance as a fuel conservation measure is grossly unfair. To allow the sole operator of the largest limosine to proceed at 54 miles per hour, and preclude the frugal, economizing and conserving operator of a small Honda motorcycle (with a passenger) the right to use 1/10th the gasoline in traveling 56 miles per hour, is patently unreasonable.

Conclusion

From time to time under our system of jurisprudence, it becomes necessary for a court to give the legislature (or the executive branch) a lecture on liberty. "Liberty implies the absence of arbitrary restraint * * * " **West Coast Hotel Co. v. Parrish,** supra. Arbitrary restraint was what Mr. Dority faced on the date he was stopped and cited. * * *

On September 3rd, 1986 the trial court set forth its letter OPINION as follows:

In this case, the defendant is charged with the traffic infraction of Exceeding the Maximum Speed or violation of the 55 miles per hour Speed Rule. The defendant raises issues in the defense based on factual matters and the alleged unconstitutionality of the statutes defining the offense.

The defendant has submitted memoranda setting forth his position and argument. The State has declined to submit any additional memorandum.

Trooper Easterday testified that he obtained a reading of 71 MPH on his radar device for the defendant's vehicle and that the defendant then rapidly decelerated. The defendant testified that he was driving in excess of 55 MPH, but did not know how fast. Clearly, unless the defendant prevails on one of his non-factual theories of defense, he is guilty of the offense charged in the Complaint.

The defendant contends that the officer stopped the defendant in violation of ORS 810.420 in that the officer did not cause a permanent memorialization of the reading displaying the defendant's speed on the radar device. The defendant's theory of the definition of "recording" as used in the statute is incorrect. Recording in the statute refers only to a physical reading of some type, no matter how temporary, indicating the speed of the defendant's vehicle as measured by the radar device. The officer was in compliance with ORS 810.420 when stopping the defendant and issuing him a citation.

The defendant next challenges the law based on improper delegation of power and void for vagueness grounds. The challenges are improperly taken. ORS 810.180(1)(b) authorizes the Department of Transportation to fix a maximum speed under certain conditions; but not in excess of 55 miles per hour. The legislature has established a 55 mile per hour maximum speed, and that is the violation alleged before the Court.

The defendant is Guilty of the violation alleged in the Complaint. I will impose a total fine in the sum of $35.00 plus $6.00 costs. Payment should be made forthwith.

Because of my ruling in this matter, I do not reach the defendant's request to take judicial notice of certain alleged matters.

JUDGMENT

THIS CAUSE came on for trial on June 12th, 1986. In this case, the defendant is charged with the traffic infraction of violating the fuel conservation maximum speed limit, ORS 811.110. The defendant raises issues in defense based on factual matters and the alleged unconstitutionality of the statutes and procedures defining the offense.

Trooper Easterday testified that he obtained a reading of 71 MPH on his radar device for the defendant's vehicle and that the defendant then rapidly decelerated. The defendant testified that he was driving in excess of 55 MPH, but that he did not know how fast. Unless the defendant prevails on one of his non-factual theories of defense, he is guilty of the offense charged.

The Court has considered the authorities submitted by and the argument of counsel for the parties, and being fully advised in the premises,

NOW, THEREFORE, hereby enters its JUDGMENT as follows:

1. Defendant is guilty of the Class C Traffic Infraction defined by ORS 811.100 [sic] and related procedures.

2. In punishment therefor, a fine of $35.00 is imposed and costs in the sum of $6.00 are levied against him.

3. Defendant posted bail. The fine and costs are subtracted therefrom and the balance refunded to him.

DATED and entered this 16th day of December, 1986.

On July 15th, 1987, the Court of Appeals of the State of Oregon filed its judgment and order as follows:

"IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,

Respondent,

v.

ARTHUR DANIEL DORITY, JR.,

Appellant.

Court of Appeals Case No. CA A42560
Trial Court Case No.: T86-1300 (D)
Appeal from: Polk County Judge: Charles E. Luukinen
Date Argued: June 16, 1987
Before: Buttler, Presiding Judge, and Warren and Rossman, Judges.
Attorney for Appellant : Jesse R. Himmelsbach, Jr.
Attorney for Respondent : Virginia L. Linder/Philip Schradle
Affirmed without opinion. Date filed: July 15, 1987

****

Prevailing party or parties: Respondent"

On October 27th, 1987 the Supreme Court of the State of Oregon filed its order as follows:

"IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,	)	
Respondent	)	ORDER DENYING
v.	)	REVIEW
DORITY, ARTHUR DANIEL JR	)	CA A42560
Petitioner	)	SC S34358

The Court has considered the petition for review and ORDERS that it be denied.

DATE: OCTOBER 27, 1987.

/S/ EDWIN D. PETERSON
EDWIN D. PETERSON
CHIEF JUSTICE

COPIES TO:
SCHRADEL, PHILIP Attorney for: Respondent
HIMMELSBACH, JESSE R. JR Attorney for: Petitioner"

The following are excerpts from "Appellant's Brief and Abstract of Record" which Petitioner filed in the Court of Appeals of the State of Oregon:

> Our Supreme Court has said:
>
> "The police power is broad and far-reaching, and it is difficult, if not impossible, to fix its bounds. Yet an exercise of the police power can never be justified unless it is reasonably neccessry in the interests of the public order, health, safety, and welfare. The legislature is not the final judge of the limitations of the police power, and because the legislative action must be reasonably necessary for the public benefit, the validity of all police functions depends upon whether they can ultimately pass the judicial test of reasonableness. **Union Fisherman's Co. v. Shoemaker,** 98 Or. 659, 675, 193 P. 476, 194 P. 854." **General Electric Co. v. Wahle,** 201 Or. 302, 320, 296 P.2d 635 (1956).
>
> and further:
>
> "The right of an owner of property to fix the price at which he will sell is an inherent attribute of the property itself, and is within the protection of the state and federal constituitions [citing cases]." **Wahle,** p. 319. [App. Br. 8]

Then in a more recent case, **State v. Self,** 75 Or. App. 230, 706 P.2d 975 (1985), the court said:

> "The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of fact finding power is whether the enactment is complete when it leaves the legislative halls. [citing **Foeller,** A-14] A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application [citing cases]."

How can it be said that the challenged legislation is complete when it contains no expression of legislative policy, and no safeguards? Power is given to the OTC to keep the restriction in place forever. It has not been instructed to vacate its order upon the termination of any current or imminent shortage it may find to exist. The OTC has been given general law-making power, in this regard.

As in **Foeller**, the act was incomplete when it left the legislature. It contained no instruction at all about the lifting of the restriction.

Here, defendant has not been protected by any meaningful safeguards. Judicial review of the OTC action was not available to defendant in a direct review proceeding, as was the case in **Bercot**. Certainly not before the fact. He can only get it here, after being cited and tried, etc.

The arbitrariness from which defendant is entitled to protection is the establishment of a limit on his freedom to travel which has extended in time long beyond legitimate constitutional limits. The order could not have been constitutionally promulgated on the date the citation was issued to the defendant because there was neither a current nor an imminent shortage of motor fuel (whatever that is) at the time. Please see the sources quoted (A-5-11). Honest factfinding is jurisdictional. Please compare **Smith** v. **Minto**, 90 Or. 351, 353, 48 P. 166 (1987), where a false finding of an "unsafe and dangerous" street caused an assessment to be void.

The legislature itself could not have constitutionally limited defendant's right to expend his gasoline absent some legitimate reason. Please compare **Wahle** (207 Or. at 319), where the selling price of electrical appliances could not be fixed.

Here defendant was expending an asset—gasoline. He was burning it for a consideration—travel. Such is certainly analogous to selling. Defendant was free to choose to get 28-30 miles per gallon by traveling 71 miles per hour, or to travel 55mph, or perhaps 45 mph, and possibly get 34 miles per gallon, in disposing of his gasoline. The gasoline was his. He could legally give it away if he chose.

The oil shortage having been replaced with an oil glut, the OTC order had become an unwarranted regulation of a legitimate activity, and a violation of defendant's rights under the Due Process Clause of the Fourteenth Amendment. **Leathers** v. **City of Burns**, 254 Or. 206, 224, 444 P.2d 1010 (1968).

When the justification for the exercise of the police power ceases to exist, the law becomes unreasonable and unconstitutional. **Christian et al. v. LaForge**, 194 Or. 450, 471, 242 P.2d 797 (1952) [cited in **Wahle**, 207Or. at 318]. [App. Br. 9]

The following is an excerpt from the Petition for Review Petitioner filed in the Supreme Court of the State of Oregon:

Further, both state and federal constitutions afford Equal Protection. It is not "equal protection" when some litigants receive reasoned and published consideration of the issues which they present to the appellate courts, while others do not.

In the instant case, the Court sees one-half of a circumstance in the law where the Court of Appeals has affirmed two inconsistant results reached in two District Courts, without rendering any opinion in either case.

In **State v. Robert James McCrea**, CA 41561 (affirmed without opinion on April 29, 1987), at the District Court level, the defendant asked the Court to take judicial notice of the fact that no fuel shortage existed in the State ofOregon at the time in question. The trial judge did so, and the state acquiesced in this ruling. Nevertheless, the trial court found the underlying statutes (the same in the instant case) to be constitutional.

In the instant case, the defendant asked the Court to take judicial notice of the fact that there was neither a current nor an imminent fuel shortage in the state, and not only did the Court fail to take judicial notice of such fact, the state objected to the taking of such notice.

Thus not only have two district courts made contrary rulings on the question, the state has also taken inconsistent positions, and the Court of Appeals has sanctioned the disparity by its inaction.

Surely, this is not what the constitutions mean.